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No. 02-891

IN THE

Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

AMICUS CURIAE BRIEF FOR THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. May a defined benefit pension plan that complies with the procedural requirements of ERISA Section 203(a)(3)(B) and Tax Code Section 411(a)(3)(B) permanently forfeit early retirement payments during time periods when a reemployed participant remains in suspendible employment?

2. If a subsidized early retirement "payment" was available, but not payable for a specific month due to an ERISA authorized suspension, must the plan's formulae that measure his or her accrued benefit or his or her early retirement benefit be adjusted upward to reflect the value of the payment the participant lost by remaining in suspendible employment?

3. Will such an upward actuarial adjustment be required by ERISA Section 204(g) and Tax Code Section 411(d)(6) with respect to an early retiree who "unretires" (by returning to employment) if a plan's original narrower suspension of benefits rule was broadened to the full extent permitted by ERISA Section 203(a)(3)(B) and Tax Code Section 411(a)(3)(B) after his or her suspendible reemployment commenced?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF THE CASE	3
Facts	3
Holdings Below	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6
A. The Court Below Would Prohibit What ERISA Explicitly Authorizes, Permanent Forfeiture of Early Retirement Payments While a Reemployed Retiree Remains in Suspendible Employment	6
B. The Court Below Failed to Distinguish Between: (i) Payments that may be Permanently Forfeited During a Period of Suspension; and (ii) Early Retirement Formulae that Merely Measure a *Potential* Flow of Monthly Payments and That Remain Available if a Participant Decides to Stay Retired, Return to Retirement Status or Seek Employment in a Different Industry	16
C. The Court Below Expanded the Anti-Cutback Rule Beyond its Intended Scope in a Manner that is not Textually Compelled, Interferes with the Intended Operation of the Suspension Rules and Calcifies Both Rules by Preventing Plan Amendments that Keep Pace with Industry and Employment Changes	24

TABLE OF CONTENTS—Continued

	Page
D. Respondent Misstated the ERISA Suspension Rules and Would Have this Court Create a New Right to Double-Dip in Contravention of those Rules	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1985)	25
BE&K Construction Co. v. NLRB, 536 U.S. 516 (2002)	1
Calif. Dept. Human Resources Development v. Java, 402 U.S.	22
Carnation Co., Inc. & Central States Pension Fund, 9 E.B.C. 1409, 1424 (Nagle, Arb.) (1988)(AAA No. 51 621 0023 84)	19
Chevron USA, Inc. v. Echazabal, 536 U.S. 73 (2002)	1
Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)	15
Circuit City Stores, Inc. v. Adams, 535 U.S. 1112 (2002)	1
Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995)	24
Denton v. First National Bank of Waco, 765 F.2d 1295, 1298 n. 5 (5th Cir. 1985)	19
Dillard v. Industrial Comm of Virginia, 416 U.S. 783 (1974)	22
Goldberg v. Kelly, 397 U.S. 254 (1970)	22
Heinz v. Central Laborers' Pension Fund, 303 F.3d 802 (7th Cir. 2002)	3, 4, 5, 24
Indiana Employment Security Division v. Burney, 409 U.S. 540 (1973)	22
Lockheed Corp. v. Spink, 517 U.S. 882, 889-91 (1996)	24
Morton v. Macari, 417 U.S. 535 (1974)	25
Pollard v. E.I. Dupont deNemours & Co., 532 U.S. 843 (2001)	1
Richardson v. Wright, 405 U.S. 208 (1972)	22

TABLE OF AUTHORITIES—Continued

Page

Spacek v. Maritime Association, 134 F.3d 283 (5th Cir. 1998) 3, 4, 5, 27, 28, 30
Wheeler v. Montgomery, 397 U.S. 280 (1970) 22

STATUTES

Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) ... 2
ERISA § 3(22); 29 U.S.C. §1002(22) 6, 7, 18
ERISA § 3(23); 29 U.S.C. §1002(23) 11
ERISA § 3(24); 29 U.S.C. §1002(24) 11
ERISA § 3(31); 29 U.S.C. §1002(31) 18
ERISA § 203(a)(2); 29 U.S.C. §1053(a)(2) 21
ERISA § 203(a)(3)(A); 29 U.S.C. § 1053(a)(3)(A) 21
ERISA § 203(a)(3)(B); 29 U.S.C. § 1053(a)(3)(B) ..... *passim*
ERISA § 204(b)(1)(H)(iii)(II); 29 U.S.C. § 1054(b)(1)(H)(iii)(II) 16, 19, 27
ERISA § 204(b)(1)(H)(v); 29 U.S.C. § 1054(b)(1)(H)(v) 12, 16
ERISA § 204(c)(1); 29 U.S.C. § 1054(c)(1) 21
ERISA § 204(c)(2)(B); 29 U.S.C. § 1054(c)(2)(B) 6, 7, 18
ERISA § 204(g); 29 U.S.C. § 1054(g) 5, 17, 24, 25, 26, 27
ERISA § 205; 29 U.S.C. § 1055 21
ERISA § 205(a); 29 U.S.C. § 1055(a) 6, 7, 18
ERISA § 206(a); 29 U.S.C. § 1056(a) 27
ERISA § 302(b)(2)(B)(iv); 29 U.S.C. § 1082(b)(2)(B)(iv) 18
ERSA § 302(b)(3)(ii); 29 U.S.C. § 1082(b)(3)(ii). 18
ERISA § 505; 29 U.S.C. § 1135 15
I.R.C. § 401(a)(11) 6, 7, 18
I.R.C. § 401(a)(14) 27

TABLE OF AUTHORITIES—Continued

Page

I.R.C. § 411(a)(3)(B) 4, 7, 8, 20, 24, 25, 27, 28
I.R.C. §411(a)(7)(A)(i) 11
I.R.C. §411(a)(7)(A)(ii) 12
I.R.C. §411(a)(8) 11
I.R.C. §411(a)(9) 6, 7, 18
I.R.C. §411(b)(1)(H)(iii)(II) 16
I.R.C. §411(b)(1)(H)(iv) 12, 16
I.R.C. §411(d)(6) 5, 27
I.R.C. §412(b)(2)(B)(iv) 19
I.R.C. §412(b)(3)(ii) 19
I.R.C. §412(l)(2)(D) 19
I.R.C. §412(l)(3)(D)(ii)(II) 19
I.R.C. §412(l)(7)(C) 19
I.R.C. §412(l)(10) 19
I.R.C. §417 ..... 6, 7, 18
Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, §9203(b)(1), 100 Stat. 1874 (1986) 11
Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, §7871(b)(2), 103 Stat. 2106 (1989) 11
Reorganization Plan No. 4 of 1978, §101, 43 Fed. Reg. 47713, 92 Stat. 3790, as amended by Pub. L. No. 99-514, §2, Oct. 22, 1986, 100 Stat. 2095, codified at 5 U.S.C. Appendix 1 ..... 12, 15
Social Security Act §§202(w), 203, 205 & 225; 42 U.S.C. §§402(w), 403, 405 & 425 22
Social Security Act Amendments of 1972, §§103, 105 & 106, Pub. L. No. 92-603, 86 Stat. 1329 (1972) 22

AGENCY AUTHORITIES

29 C.F.R. §2530.203-3 29
29 C.F.R. §2530.203-3(b)(4) 5

TABLE OF AUTHORITIES—Continued

	Page
Treas. Reg. §1.411(a)-7(b)	11
Treas. Reg. §1.411(c)-1(f)	21, 27
Treas. Reg. §1.411(d)-4	5
Treas. Reg. §1.412(c)(1)-1(b)	19
Treas. Reg §1.412(c)(3)-1	19
Preamble to Proposed 29 C.F.R. § 2530.203-3, *printed at* 43 Fed. Reg. 59048 (Dec. 19, 1978)	15
Preamble to final 29 C.F.R. § 2530.203-3, *printed at* 46 Fed. Reg. 8894 (Jan. 27, 1981)	14, 15
Preamble to revised final 29 C.F.R. § 2530.203-3, *printed at* 46 Fed. Reg. 59243 (Dec. 4, 1981)	15
IRS Examination Guidelines, Announcement 98-1, 1998-2 I.R.B. 38 (1/12/98)	19
Office of the Historian of Social Security, RESEARCH NOTE #7: BRIEF HISTORY OF THE RETIREMENT EARNINGS TEST, *available at, http://www.ssa.gov/history/ret.html*	23
Social Security, HISTORY OF THE PROVISIONS OF OLD-AGE, SURVIVORS, DISABILITY, AND HEALTH INSURANCE, part I(H) (1999), *available at, http://www.ssa.gov/OACT/HOP*	23
LEGISLATIVE HISTORIES AND OTHER LEGISLATIVE AUTHORITIES	
H.R.Rep.No. 93-779, 93D CONG, 2D SESS., at 58 (1974)	9
H.R. 2, § 3(19), 93D CONG, 2D SESS. (1974)(as passed in the House on February 28, 1974 and printed in the Senate on March 6, 1974), reprinted *as*, III SUBCOMM ON LABOR, SENATE COMMITTEE ON LABOR AND PUB. WELFARE, 94TH CONG., 2D SESS, LEGISLATIVE HISTORY OF ERISA, 3898, at 3909 (Committee Print 1976)	9

TABLE OF AUTHORITIES—Continued

	Page
120 CONG. REC. H 3977, at H 3990 (extension of remarks of Rep. Carl D. Perkins, Chair of the House Education & Labor Committee regarding the substitute version of H.R. 2)(daily ed. Feb. 25, 1974), *reprinted as*, II SUBCOMM ON LABOR, SENATE COMMITTEE ON LABOR AND PUB. WELFARE, 94TH CONG., 2D SESS, LEGISLATIVE HISTORY OF ERISA, 3293, at 3326 (Committee Print 1976)	9
120 CONG. REC. S15739 (daily ed. Aug. 22, 1974)(statement of Sen. Harrison Williams during final ERISA floor debates)	10
130 Cong. Rec. 23,487 (1984) (statement of Rep. William Clay)	26
STAFF OF JOINT COMM ON TAXATION, 101ST CONG., 2D SESS.,STAFF DESCRIPTION OF PRESENT-LAW TAX RULES RELATING TO QUALIFIED PLANS, at 45 (1990)(JCS-9-90)	19
COMM WAYS & MEANS, 101ST CONG., 1ST SESS., BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS, at 16-18 (Comm. Print 1989)(WMCP: 101-41)	23
COURT RULES	
Supreme Court Rule 37.6	1
OTHER AUTHORITIES	
William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, LEGISLATION AND STATUTORY INTERPRETATION, 263, 273-74 & 312-28 (2000)	15, 25, 26

TABLE OF AUTHORITIES—Continued

Page

Felicia A. Finston, *Plan Qualification – Pension and Profit Sharing*, BNA TAX MANAGEMENT & COMP PORTFOLIOS, Portfolio 351-4th, at IV(B)(5) (2003) 19

INTEREST OF THE *AMICUS CURIAE*

The Society for Human Resource Management ("SHRM")[1] is the world's largest association devoted to human resource management. Founded in 1948, SHRM has more than 500 affiliated chapters within the United States and represents the interests of more than 175,000 individual members. SHRM's mission is to serve the needs of human resource professionals by providing resources to advance the human resource profession and assisting them in developing and executing organizational human resource strategies. Such strategies include the development, design and administration of retirement and other employee benefit plans. SHRM also represents the interests of its members in connection with legal, and other developments that have an impact of their ability to successfully operate such employee benefit programs and other human resources practices or programs.

SHRM regularly represents the interests of its members in important employee benefits and other human resource matters before the courts, Congress, the Executive Branch and independent regulatory agencies. Such representation is a significant aspect of SHRM's activities. In the past SHRM advanced those interest by filing *amicus curiae* briefs in employee benefits and labor relations litigation. For example, SHRM filed amicus curiae briefs in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73 (2002); *Circuit City Stores, Inc. v. Adams*, 535 U.S. 1112 (2002); and *Pollard v. E.I. Dupont deNemours & Co.*, 532 U.S. 843 (2001).

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae,* SHRM, states that no counsel for a party authored this brief in whole or in part, and no persons other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3. Counsel for the parties informed *amicus curiae* that they have filed blanket consents that include consents to filing of this brief.

Many of SHRM's members sponsor defined benefit pension plans with early retirement features and benefit suspension practices developed at great cost in reliance upon agency interpretations of the Employee Retirement Income Security Act of 1974[2] ("ERISA") suspension of benefit rules. The ability of SHRM members to meet their defined benefit plan sponsorship and administration obligations depends to a large extent on their ability to rely upon such settled interpretations of law and apply those principles to a wide variety of unique factual circumstances.

SHRM and its members firmly believe that defined benefit pension plans will be seriously disrupted if the decision below is affirmed. Specifically, they are deeply concerned because the decision below would expand the scope of the ERISA anti-cutback provision beyond its intended scope. This unwarranted interpretation will result in significant new plan benefit and plan administration costs that, because of the broad applicability of the reasoning employed by the Seventh Circuit majority, is not limited to multiemployer plans.[3]

The benefit suspension rules applicable to reemployed early retirees are a well established exception to ERISA's vesting rules. Those rules reflect a Congressional judgment that when early retirees are reemployed in suspendible employment, their plans and plan sponsors should be free of the vesting rules that might otherwise require double-dipping, simultaneous payment of current wages and retirement benefits to participants who "unretire." Such unexpected benefit entitlements could drain plan assets and dilute the retirement

[2] Pub. L. No. 93-406, 88 Stat. 829 (1974).

[3] The precise change considered below, a change in the scope of the "industry employment" component of suspendible employment, is only relevant to multiemployer plans. However, the ruling below would be equally applicable to amendments to other aspects of the definition of suspendible employment that apply to all qualified plans and to changes in the suspension procedures followed by other qualified plans.

security of other participants. They would have a long-term, sustained impact on employer plan funding costs. Moreover, because of widespread concerns about plan funding due to the so-called "Perfect Storm" of market losses, low interest rates and the virtual disappearance of the traditional 30-year Treasury Bond benchmark rate used by pension plans, this additional judicially-created liability could have a material adverse impact on employer financial statements.

SUMMARY OF THE CASE

Facts. Although this Court has before it only matters relating to Mr. Heinz' claim of a continuing right to receive the subsidized early retirement benefit payments that have been suspended by Petitioner, the conflict between the decision below[4] and the Fifth Circuit's decision in *Spacek v. Maritime Association*[5] and the striking similarity of their relevant facts invite comparison of the claims asserted in both cases.

In each case, distribution of a participant's ERISA retirement plan benefits commenced when he retired from employment covered by a multiemployer plan with enough service to qualify for a fully subsidized early retirement benefit. Specifically, the participants had retired early, that is, before the plans' normal retirement at age 65. Moreover, they had each attained sufficient pension service credits for an unreduced early retirement benefit, that is, they each were receiving an early retirement benefit in the same monthly amount as the monthly benefit they could have received for the same service beginning at normal retirement age.[6]

[4] *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802 (7th Cir. 2002).

[5] 134 F.3d 283 (5th Cir. 1998).

[6] *Spacek*, 134 F.3d at 286 (Spacek retired at age 51 with 30 years of service); *Heinz*, 303 F.3d at 803 (Heinz retired at 39 with 30 pension

In both cases, payment of early retirement benefits ceased under the plans' suspension of benefit rules because the participants did not remain retired, but resumed employment which the plans treated as suspendible employment. In *Heinz*, the return to active employment in the industry covered by the plan did not initially result in application of the plan's benefit suspension rules because the new employment was not covered by those rules until a plan amendment expanded the categories of employment that would trigger a benefit suspension.[7] In *Spacek*, the plan granted broad authority to make plan amendments and in *Heinz* the existence of such authority was apparently not questioned. In neither case was it alleged that the suspension was applied retroactively to monthly payments payable prior to the amendment.

Holdings Below. Neither Circuit's opinion turns upon an interpretation of the suspension of benefit rules of ERISA Section 203(a)(3)(B) or Tax Code Section 411(a)(3)(B).[8] Both opinions assume the plans' suspension of benefit rules, as written, complied with these provisions.[9] Moreover, neither opinion questions the plans' compliance with the

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credits, a combination of age and service). The term "subsidized" refers to the fact that the value of the early retirement benefit exceeds the reduced benefit which would be actuarially equivalent to the normal retirement benefit). The early retirement benefits in question were "fully subsidized," which means there was no actuarial reduction at all. A fully subsidized early retirement benefit is referred to as an "unreduced" early retirement benefit.

[7] Mr. Spacek was reemployed after the amendment was adopted.

[8] ERISA § 203(a)(3)(B); 29 U.S.C. § 1053(a)(3)(B); I.R.C. § 411(a)(3)(B).

[9] *Spacek*, 134 F.3d at 287-88 ("[W]e conclude the Plan's application of the Amendment to Spacek violated neither the Plan's statutory nor contractual obligations"); *Heinz*, 303 F.3d at 804 ("[P]laintiffs do not contend that the restrictions on post-retirement employment contained in the plan, either before or after the 1998 amendment, violate these restrictions.").

procedural rules applicable to suspensions of benefits, including the requirement of notice prior to actual benefit suspension.[10] The holdings expressed by the Fifth Circuit in *Spacek* and the majority in *Heinz* rest instead upon contradictory interpretations of the anti-cutback rules of ERISA Section 204(g).[11]

SUMMARY OF ARGUMENT

In order to prevent double-dipping simultaneous receipt of paid wages and retirement benefits, ERISA explicitly authorizes plans that follow required specific prior notification and other benefit suspension procedures to permanently forfeit a participant's subsidized early retirement payments. This right to forfeit early retirement payments only applies to a specific month's payment if the reemployed participant fails to resume retirement status, reduce his or her hours to part-time status, or transfer to employment in another industry or geographic area.

In its ruling below, the Seventh Circuit majority mistakenly deemed the term "suspension" and the terms "reduce" or "eliminate" as interchangeable. This mistake was related to and complicated by the failure of that Court to distinguish between: (i) "payments" for particular months, that may be permanently forfeited under the suspension rules; and (ii) the plan's early retirement formulae that merely measures a *potential* flow of monthly payments, that remain available if the participant decides to stay retired, return to retirement

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[10] *Spacek*, 134 F.3d at 287-88; *Heinz*, 303 F.3d at 804. Benefits may only be suspended for a given month if prior to that month the participant has actually received personal written notification of the impending suspension. 29 C.F.R. § 2530.203-3(b)(4). *See also* note 8 *infra* & accompanying text.

[11] ERISA § 204(g); 29 U.S.C. § 1054(g). *Spacek*, 134 F.3d at 288-92; *Heinz*, 303 F.3d at 804-13. See also I.R.C. § 411(d)(6); Treas. Reg. § 1.411(d)-4.

status, reduce his or her hours of employment or seek employment in a different industry or area. These distinctions must be recognized as significant since they are consistent with the text of the statute, the legislative history, interpretive agency regulations and the common understanding of the term "suspension" under similar statutory schemes at the time ERISA was enacted.

Based upon its mistaken constructions of these statutory terms, the Court below gave the ERISA anti-cutback rule an expansive interpretation that is not textually compelled, interferes with the intended operation of the ERISA suspension rules and unduly restricts normal plan changes needed to keep pace with industry and employment changes.

Respondent misstated the ERISA suspension rules. He asks this Court to take the unwarranted step of creating a new right to double-dipping continued receipt of retirement payments or their economic equivalent despite a participant's return to paid employment.

ARGUMENT

A. The Court Below Would Prohibit What ERISA Explicitly Authorizes, Permanent Forfeiture of Early Retirement Payments While a Reemployed Retiree Remains in Suspendible Employment.

Defined benefit plans are designed to achieve cost efficient risk shifting of retirement burdens within large groups. Such plans ordinarily pay benefits in the form of life annuities or joint life annuities to former employees and their spouses or other beneficiaries. Both long-lived and short-lived retirees entitled to an annuity receive that benefit during their retirement years based upon their actual life span (and that of their beneficiaries).[12] This has the effect of redirecting plan

[12] ERISA §§ 3(22), 204(c)(2)(B) & 205(a); 29 U.S.C. §§ 1002(22), 1054(c)(2)(B) & 1055(a); I.R.C. §§ 401(a)(11), 411(a)(9) & 417.

assets from those with the least need (short-lived retirees or beneficiaries) to those with the greatest need (retirees or beneficiaries who superannuate).[13] The premise of such a payment scheme is that retirement annuities replace income the participants earned prior to retirement from their employment services and that they have ceased to receive due to retirement.

The suspension of benefits rules of ERISA (ERISA Section 203(a)(3)(B) and Code Section 411(a)(3)(B)) serve to protect plan assets from being depleted by double-dipping payments, e.g., continued payment of early retirement benefit payments that are not needed to replace a participant's wage or salary income because the retiree has returned to paid employment. The mechanical operation of the ERISA suspension of benefits rules as implemented by Petitioner Plan cannot be clearer. A participant's early retirement benefits will continue to be paid during months in which he or she remains "retired," in the sense that he or she does not engage in suspendible employment. During months the participant "unretires," by engaging in suspendible employment, the monthly early retirement benefit will not be paid.

The suspension of benefits rules applicable to Petitioner and other multiemployer plans are part of ERISA's minimum vesting rules. The ERISA vesting rules distinguish between impermissible forfeitures of a participant's normal retirement

[13] *Id.* Defined benefit plans may be likened to a lottery or casino. However, instead of the "house" or the lottery sponsor having an overwhelming edge, the plan participants as a whole have the advantage. But individual participants sometimes lose if they die before retirement or they do not live very long in retirement. On average most employees may survive for a period approximating their life expectancies. However, some retirees will superannuate. These retirees are the "big winners" under a defined benefit plan because they experience the greatest benefits from the risk-spreading characteristics of such plans. They are also likely to be the "biggest losers" in defined contribution plans.

benefit formula amount, the "accrued benefit," and suspension of a particular benefit payment, which is a permitted forfeiture:

> (B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—
>
> (i) ***
>
> (ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan as when such benefit commenced*** .[14]

The House Education and Labor Committee description of the intent of the suspension of benefits exception contained in the House-passed version of ERISA clearly reflects that the suspension of benefits exception was designed to permit forfeiture of otherwise available early retirement benefit payments, i.e., both permanent early retirement benefits that could continue beyond 65 and, more broadly, supplemental benefits that are payable only prior to age 65:

> *Permitted forfeitures of vested rights.*—*** [A] plan is permitted to suspend payment of benefits while the participant is working for the employer (for example, where an early retiree returns to work to increase his subsequent pension benefits). In the case of a multiemployer plan, the benefits may be suspended if the employee has resumed employment in the same industry even though not with the same employer. These rules are not to prevent suspension of part of an early retirement supplement (such as a so-called social security supplement) on account of reemployment, even with another employer or in another industry.[15]

[14] ERISA § 203(a)(3)(B); 29 U.S.C. § 1053(a)(3)(B). *See also*, I.R.C. § 411(a)(3)(B).

The operation of the suspension of benefits rule was further explained by a Floor Manager during the Senate debates prior to passage of the Conference version of ERISA. In this explanation another rationale for the suspension of benefits rule was offered, that is, a desire to protect high wage

[15] 120 CONG. REC. H 3977, at H 3990 (extension of remarks of Rep. Carl D. Perkins, Chair of the House Education & Labor Committee regarding the substitute version of HR 2)(daily ed. Feb. 25, 1974), *reprinted as*, II SUBCOMM ON LABOR, SENATE COMMITTEE ON LABOR AND PUB. WELFARE, 94TH CONG., 2D SESS, LEGISLATIVE HISTORY OF ERISA, 3293, at 3326 (Committee Print 1976). After reporting HR 2, the Committee on Education and Labor authorized its Chairman to replace the text of HR 2, as previously reported, with a substitute that combined elements of HR 2 and HR 12906. The description of that substitute, which was the bill that passed in the House, was contained in a Committee materials quoted in the text accompanying this note. Those materials were described by the Chairman as "in the nature of a committee report." Id. at 3293. This material was not separately printed prior to passage, but was printed as part of the Congressional Record as an extension of Chairman Perkins' remarks. The comparable Ways and Means Committee Report contained an identical description of this provision. H.R.Rep.No. 93-779, 93D CONG. 2D SESS., at 58 (1974).

While the House passed language described by Chairman Perkins was more sketchy than the final text of ERISA, it contained all the critical elements relevant to this case. The House version read as follows:

> [A] right to an accrued benefit shall not be treated as forfeitable merely because the plan provides *** that payment of benefits is suspended during periods when the participant has resumed employment with the employer (or, in the case of a multiemployer plan, has resumed employment in the industry before normal retirement age); ***.

H.R. 2, §3(19), 93D CONG, 2D SESS. (1974) (as passed in the House on February 28, 1974 and printed in the Senate on March 6, 1974), *reprinted as*, III SUBCOMM ON LABOR, SENATE COMMITTEE ON LABOR AND PUB. WELFARE, 94TH CONG., 2D SESS, LEGISLATIVE HISTORY OF ERISA, 3898, at 3909 (Committee Print 1976).

employers and their employees from downward wage pressures due to the ability of industry competitors to rehire its retirees at lower wages due to continuation of their early retirement benefits:

> The conference substitute provides that subject to regulations of the Secretary of Labor, a plan may be permitted to suspend the payment of pension benefits when a retiree returns to work for the employer who is paying such benefits. In addition, a multiemployer plan would be permitted to provide, subject to regulations, that payment of benefits may be suspended when a retiree returns to work in the same industry, in the same trade or craft, and in the same geographical area as that covered by the plan. The type of suspension contemplated by this provision are those which prevent plan assets from being used to pay retirement benefits to persons who have, in fact, returned to work for employers covered by the plan. Also contemplated are provisions designed to protect participants against their pension plan being used. in effect, to subsidize low-wage employers who hire plan retirees to compete with, and undercut the wages and working conditions of employees covered by the plan.
>
> It is expected that regulations issued by the Secretary would not permit use of suspension provisions where they are not necessary to deal with the types of situations I have described. Moreover, while such regulations may, as appropriate to particular industry conditions such as those characterized by casual and intermittent employment, provide that benefits can be suspended not only for the exact number of days or hours of employment, but for a reasonable period of time during which the employment occurs, such regulations should preclude such suspensions which are not necessary to effectuate the policies I have mentioned.[16]

[16] 120 Cong. Record S15739 (statement of Sen. Harrison Williams during ERISA Debates) (daily ed. Aug. 22, 1974).

Thus, whatever purpose is viewed as paramount, there can be no doubt that Congress intended the suspension of benefit rules to permit a suspension of payments that were otherwise available to early retirees if they did not resume their retired status after receiving a warning their benefits would be suspended.

Such suspensions of payments otherwise actually available are not viewed as a reduction of the participant's "accrued benefit," i.e., the formula measurement of the participant's potential benefit. Unlike the suspension exception that focuses upon specific benefit payments during a discrete period of re-employment, the term "accrued benefit" deals with the measurement of a participant's entire potential benefit:

> (23) The term "accrued benefit" means—
>
> (A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 204(c)(3), expressed in the form of an annual benefit commencing at normal retirement age;[17]

Standing alone, even the accrued benefit formula is not itself a right to an actual benefit payment. Something else has to happen first before a participant will become entitled to an

[17] ERISA § 3(23); 29 U.S.C. § 1002(23). ERISA added a nearly identical definition to the Tax Code. I.R.C. § 411(a)(7)(A)(i).

ERISA also offers a definition of the term normal retirement age that generally refers to the earlier of the normal retirement age specified in the plan or the later of age 65 or the completion of 10 years of plan participation. ERISA § 3(24); 29 U.S.C. § 1002(24). *See also*, I.R.C. § 411(a)(8). The current text of these provisions is unchanged with the sole exception that the 10 years of plan participation prong of the statutory default definition of normal retirement age was reduced to five years in two stages. *Compare*, Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9203(b)(1), 100 Stat. 1874 (1986), *with*, Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7871(b)(2), 103 Stat. 2106 (1989). *See also*, Treas. Reg. § 1.411(a)-7(b).

actual benefit payment. For example, the participant must perform sufficient service to have a vested right and the participant or his beneficiary must survive long enough to receive plan payments.[18] Thus, even the accrued benefit formula is just a measure of benefit availability, not an actual benefit payment. To be sure, the payments that a participant eventually receives will be based upon that measurement, should the participant become vested and survive until his or her benefit commencement date.

Although subsidized early retirement benefits are determined with reference to the accrued benefit, they are not considered a part of the accrued benefit. Elsewhere in the ERISA vesting rules it is specified that available subsidized early retirement payments are disregarded in determining benefit accruals.[19]

Thus, ERISA protects the "opportunity" to receive actual payment of benefits based upon the accrued benefit formula, including early retirement payments. But ERISA does not necessarily protect the available "payment" itself. As noted above with respect to service vesting, and as discussed in greater detail below regarding the other vesting rules, failure of a participant to meet all the qualifications for vesting may

[18] *See* notes 12 & 13 *supra* and 25, 28, 29, 31 & 45 *infra* & accompanying text.

[19] ERISA §204(b)(1)(H)(v); 29 U.S.C. § 1054(b)(1)(H)(v); I.R.C. § 411(b)(1)(H)(iv). The Secretary of Labor was initially authorized to issue regulations interpreting these parallel "accrued benefit" and "early retirement subsidy" provisions, but that authority, other than the authority directly related to the suspension of benefit rule itself, was subsequently transferred to the Treasury Department. Reorganization Plan No. 4 of 1978, §101, 43 Fed. Reg. 47713, 92 Stat. 3790, as amended by Pub. L. No. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095, codified at 5 U.S.C. Appendix 1. The Treasury Department exercised this authority by construing this definition of a participant's "accrued benefit" as excluding subsidized early retirement benefits. Treas. Reg. § 1.411(a)-7(a)(1)(ii).

lead to forfeiture of fully available benefit payments,[20] while at the same time leaving unaffected the opportunity to receive the other payments if the vesting deficiency is subsequently remedied by, for example, a resumption of retirement, reduction in hours to part-time status or employment in another industry or area. Of course one forfeiture event, death, cannot be remedied.

In the Preamble to the final suspension of benefit regulations, the Department of Labor offered a detailed discussion of the impact of the suspension of benefit rules as the exclusive method whereby a plan may permanently forfeit early retirement payments of persons who are reemployed:

> *Early retirement benefits.* The Department is aware that certain plans provide that under certain circumstances a plan participant may be entitled to begin receiving pension benefits prior to attainment of normal retirement age under the plan. The applicability of the regulation in the case of an early retiree was discussed in footnote 9 to the preamble of the proposed regulation. There the Department noted that because section 206(a) of the Act, section 401(a)(14) of the Code and the regulations thereunder require a plan only to pay the actuarial equivalent of the normal retirement benefit to an early retiree, a plan would not be prohibited from ceasing payment of benefits to an early retiree for any reemployment, so long as such benefits were actuarially recalculated in order to compensate for the temporary withholding, and if payment of benefits under the recalculation began no later than normal retirement age. The Department stated, however, that if a plan intended to withhold permanently the benefits of an early retiree, then the plan would be permitted to do so only in the circumstances described in the regulation
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> * * *

[20] *See* notes 12 & 13 *supra* and 25, 28 & 29 *infra* & accompanying text.

[I]t is the Department's view that sections 203(a) and 206(a), as here relevant, are designed to protect a plan participant's right to receive a normal retirement benefit or its actuarial equivalent. When a plan provides the actuarial equivalent of a normal retirement age, a permanent withholding of a portion of such early retirement benefit would effect a forfeiture of a portion of the affected employee's normal retirement benefit that would have commenced at normal retirement age. The Department does not believe that, by commencing actuarially reduced benefits before normal retirement age, a plan is permitted to subject such benefits to forfeiture under circumstances other than those permitted under the Act. Accordingly, it is the Department's position that a permanent withholding of benefits payable prior to normal retirement age due to the early retiree's return to employment, to the extent that such withholding would effect the integrity of the actuarial equivalent of the normal retirement benefit, may be imposed only in a manner consistent with the requirements of section 203(a)(3)(B) and the regulation.[21]

Thus, a plan may permanently forfeit payments that are otherwise available to a reemployed early retiree by complying with suspension procedures spelled out in these regulations. If those procedures are not followed, an actuarial adjustment of the sort sought by the Respondent may be required.[22]

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[21] Preamble to 29 C.F.R. § 2530.203-3, *printed at* 46 Fed. Reg. 8894, Part (B) "Scope of Regulation" Jan. 27, 1981).

[22] Mr. Heinz' early retirement benefit was unreduced (i.e., fully subsidized in that the equivalent benefit at 65 was entirely unaffected by any early payments). Therefore, while other early retirees with early benefits that are not fully subsidized would be entitled to an upward actuarial adjustment for ERISA non-compliant suspensions, Mr. Heinz would not be.

For the reasons discussed above, this Department of Labor explanation of the distinction between ERISA Section 203(a)(3)(B) compliant suspensions and non-compliant suspensions and the text of its regulation are consistent with the text of ERISA and its legislative history. Moreover, because of this consistency and the fact that the Department of Labor was granted broad authority to issue such interpretive regulations and develop suspension procedures,[23] this interpretation is entitled to great deference.[24]

The principle that an available early retirement payment may be lost to the participant through an ERISA compliant suspension without diminishing his or her "accrued benefit" or triggering an upward actuarial adjustment is further reenforced by the different treatment of suspensions before and after normal retirement age. Unlike an early retirement benefit which, if properly suspended, has no impact on the accrued benefit, a suspension of a normal retirement benefit does have an impact on a participant's accrued benefit. After normal retirement, suspension is still possible, but the

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[23] ERISA §§ 203(a)(3)(B) & 505; 29 U.S.C. §§ 1053(a)(3)(B) & 1135. *See also*, Reorganization Plan No. 4 of 1978, §101, 43 Fed. Reg. 47713, 92 Stat. 3790, *as amended by* Pub. L. No. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095, codified at 5 U.S.C. Appendix 1. As the preambles to the proposed regulations, the final regulations and an amendment to the proposed regulations make clear, this regulation was developed over a three year period based upon the Department of Labor's considered review of the text of the statute, the legislative history and numerous public comments on the proposed and final regulations. Preamble to Proposed 29 C.F.R. § 2530.203-3, *printed at* 43 Fed. Reg. 59048 (Dec. 19, 1978); Preamble to final 29 C.F.R. § 2530.203-3, *printed at* 46 Fed. Reg. 8894 (Jan. 27, 1981); Preamble to revised final 29 C.F.R. § 2530.203-3, *printed at* 46 Fed. Reg. 59243 (Dec. 4, 1981).

[24] *Chevron U.S.A., Inc. v. Natuarl Resources Defense Council*, 467 U.S. 837 (1984). *See generally*, William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, LEGISLATION AND STATUTORY INTERPRETATION, 312-28 (2000) [hereinafter cited as "STATUTORY INTERPRETATION"].

consequences are different under the suspension of benefits rules. When a normal retirement benefit is suspended, it then may become necessary to adjust the participant's accrued benefit upward to compensate the participant for the lost payments, a requirement wholly inapplicable to proper suspensions prior to normal retirement age.[25] Thus, where Congress wanted to establish a linkage between a suspended benefit and the measurement of the participant's accrued benefit it knew how to do so and did so in an intentionally limited fashion that has no impact on suspensions of subsidized early retirement benefits.

Defined benefit pension plan sponsors, including Petitioner, Central Laborers' Pension Fund, and SHRM's members must be able to rely upon ERISA's early retirement and benefit suspension provisions and agency interpretations of those rules.

B. The Court Below Failed to Distinguish Between: (i) Payments that may be Permanently Forfeited During a Period of Suspension; and (ii) Early Retirement Formulae that Merely Measure a *Potential* Flow of Monthly Payments That Remain Available if a Participant Decides to Stay Retired, Return to Retirement Status or Seek Employment in a Different Industry.

It is uncontested that ERISA's anti-cutback rule operates to protect Respondent's accrued benefits from diminishment and prevents the Petitioner from withdrawing the *availability* of the subsidized early retirement benefit:

> (g)(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, ***

[25] ERISA §§ 204(b)(1)(H)(iii)(II) & (b)(1)(H)(v); 29 U.S.C. §§ 1054(b)(1)(H)(iii)(II) & (b)(1)(H)(v); I.R.C. §§ 411(b)(1)(H)(iii)(II) & (b)(1)(H)(iv).

> (2) For purposes of paragraph (1), a plan amendment that has the effect of—
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> (A) eliminating or reducing an early retirement benefit or retirement-type subsidy (as defined in regulations), or
>
> (B) ***.
>
> With respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy***.[26]

The disagreement between the parties concerning this provision stems from the Seventh Circuit majority's view that the forfeiture of the early retirement subsidy payments that the Respondent could have received had he remained in (or returned to) retired status was the same as an "elimination" or "reduction" of the Respondent's early retirement subsidy. The Seventh Circuit reached this conclusion even though that early retirement subsidy remained available to Respondent and would have been paid to him if he had resumed retirement or sought non-industry employment after he received notice of the pending suspension.

As described above,[27] the regulations that have construed the interplay between the ERISA vesting and accrual rules treat subsidized early retirement benefits, not as a permanently vested parts of a participant's accrued benefit, but merely as subsidized benefit payments that are available to the participant in the sense that the participants may avail themselves of those forfeitable payments by remaining retired or by promptly discontinuing suspendible employment after

[26] ERISA § 204(g); 29 U.S.C. § 1054(g).

[27] *Supra* note 19.

receiving a suspension notice. Moreover, as described in (A) above, those interpretations are consistent with the text of ERISA and with the legislative history of the suspension rules. Under the suspension rules, the early retirement subsidy is not eliminated or reduced, but remains fully available in the same unchanging monthly amount. Participants will receive those payments if they take the steps necessary to vest in those payments—in this case, by not remaining in suspendible reemployment.

Also as discussed above, a participant's accrued benefit formula is always the basis for determining the actual payments that the participant may receive once circumstances exist that entitle the participant to receive a benefit payment. Standing alone, however, an accrued benefit and any early retirement subsidy that is calculated with reference to the normal accrued benefit are merely potential benefit amounts and not actual benefit payments. The potential benefit will not become (or remain) an actual benefit payment entitlement if the circumstances necessary for payment to commence (and continue) do not exist.

There are other examples of the proper treatment of a participant's accrued benefit as a measurement of a potential or available benefit that cannot be reduced or forfeited, but may never be paid. If a participant in a defined benefit plan dies before benefits commence without a surviving spouse, or without electing a benefit form that provides for survivor payments to another beneficiary, then the participant's accrued benefit, though not eliminated or reduced, will never be paid to or for his or her benefit.[28] Instead a mortality gain will arise that benefits the plan and, through more secure funding, all other participants.[29] Similarly, if a participant

[28] ERISA §§ 3(22), 204(c)(2)(B) & 205(a); 29 U.S.C. §§ 1002(22), 1054(c)(2)(B) & 1055(a); I.R.C. §§ 401(a)(11), 411(a)(9) & 417.

[29] *Compare* ERISA §§ 3(31), 302(b)(2)(B)(iv) & 302(b)(3)(ii); 29 U.S.C. §§ 1002(31), 1082(b)(2)(B)(iv) & 1082(b)(3)(ii); I.R.C.

could receive a subsidized early retirement benefit at age 55 in the same amount as a normal retirement benefit, yet he or she does not retire at all until age 65, then the value of the subsidy (the ten years' worth of payments he or she could have received by retiring early), although not eliminated or reduced, will never be paid by the plan. When the participant actually retires at age 65 his or her normal benefit will not be increased because of the prior availability of those potential, but unpaid, early retirement payments.[30] Instead, the participant continues receiving a wage or salary for those ten years of continuous employment.

§§ 412(b)(2)(B)(iv), (b)(3)(ii) & (l)(2)(D), (l)(3)(D)(ii)(II), (l)(7)(C) & (l)(10), *and* Treas. Reg. §§ 1.412(c)(1)-1(b), 1.412(c)(3)-1, *with*, Felicia A. Finston, *Plan Qualification—Pension and Profit Sharing*, BNA TAX MANAGEMENT & COMP PORTFOLIOS, Portfolio 351-4th, at IV(B)(5) (2003), STAFF OF JOINT COMM ON TAXATION, 101ST CONG., 2D SESS.,STAFF DESCRIPTION OF PRESENT-LAW TAX RULES RELATING TO QUALIFIED PLANS, at 45 (1990) (JCS-9-90), *Denton v. First National Bank of Waco*, 765 F.2d 1295, 1298 n. 5 (5th Cir. 1985), *and, Carnation Co., Inc. & Central States Pension Fund*, 9 E.B.C. 1409, 1424 (Nagle, Arb.) (1988) (AAA No. 51 621 0023 84). *See also*, IRS Examination Guidelines, Announcement 98-1, 1998-2 I.R.B. 38 (1/12/98).

[30] *See* note 32 *infra* & accompanying text. As noted above, this actuarial adjustment may be required for suspensions after normal retirement age even if the ERISA suspension rules are complied with. If a participant works past age 65 or returns to work after age 65, his or her benefit may still be suspended, but the "lost" payments may increase his or her accrued benefit. ERISA § 204(b)(1)(H)(iii)(II); 29 U.S.C. § 1054(b)(1)(H)(iii)(II). This different treatment of suspensions after age 65 demonstrates that Congress knew how to require an increase in an accrued benefit on account of an ERISA authorized benefit suspension, but chose not to impose any such requirement for ERISA compliant benefit suspensions prior to age 65.

As discussed below, in this respect the ERISA suspension of benefit rules operate in a manner that is similar to the operation of the Social Security retirement earnings test at the time ERISA was enacted. *See* notes 34-35 *infra* & accompanying text.

Further, as described above, the suspension of benefits rules work in a similar fashion in cases of reemployment. Although participants are protected from the diminishment or elimination of the formula for the early retirement subsidy benefit, if they "unretire" for a period of time under the principles set forth in ERISA Section 203(a)(3)(B) and Code Section 411(a)(3)(B), they will have no vested right to the payment that could have been made for those months, provided the plan complies with the personal notification requirements that afford the participant with prior notice of the suspension and the opportunity to avoid the suspension by resuming retired status, reducing his or her hours or seeking non-industry employment or employment in another area. This suspension in no way reduces or eliminates the potential subsidized early benefit formula, but during a month when no benefit is actually payable, that unchanged early retirement benefit remains just a potential benefit—i.e., an available benefit—that the participant passed up in favor of wages or salary for employment services.

In reaching its conclusion that a suspension of actual payment was the same as a cutback in the participant's accrued benefit, the Seventh Circuit majority displayed a fundamental misunderstanding of this distinction between an available payment not availed of because of the participant's failure to qualify (or continue to qualify) for the payment and the accrued benefit yardstick used to measure available, but unused, potential benefit payments. The Seventh Circuit's mistake was that it equated a foregone payment with an accrual formula reduction. Under the statutory scheme those two concepts are not interchangeable. If through his or her own decisions regarding employment, a participant does not properly trigger an available subsidized early benefit payment, that act may result in the permanent loss of that potential payment, but it does not diminish the measurement of the participant's available (but thus far unused) accrued

benefit, the *potential* benefit that is protected by the anti-cutback rule.

The statute, regulations and legislative history all treat the defined term "accrued benefit" as the basic measure of a participant's potential benefit, not necessarily what will, in all events, actually be received. As measured at a particular time (based on the participant's individual career characteristics such as his or her service and compensation), the participant has an accrued benefit whether or not that benefit is vested at all, whether or not it will ever be paid, and regardless of the length of time it will actually be paid. Actual payment depends upon additional facts.[31] If an early retirement subsidy is never paid due to a participant's failure to retire early at all, his or her accrued benefit will not be increased to reflect early retirement subsidy payments he or she chose not to receive.[32]

Congressional use of the term "suspension" to refer to an appropriate interruption of benefit payments after imple-

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[31] For example, the fact that a participant has an accrued benefit attributable to employer contributions, as described in ERISA Section 204(c)(1), does not mean he or she is vested at all in that accrued benefit. Vesting is only required upon performance of the plan's vesting service requirements under ERISA Section 203(a)(2). ERISA §§ 203(a)(2) & 204(c)(1); 29 U.S.C. §§ 1053(a)(2) & 1054(c)(1). Moreover, even a vested benefit may never become payable if, for example, the participant dies without being survived by a spouse or beneficiary, under ERISA Sections 203(a)(3)(A) or 205. *See* notes 28-29 *supra* & accompanying text.

[32] "[n]o adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under [ERISA] section 203(a)(3)(B)."

Treas. Reg §1.411(c)-1(f). Of course as the participant performs additional service or receive additional compensation, those factors usually will increase the formula benefit amount, a factor along with the receipt of wages and salaries which is one of the incentives that leads early retirees to trade continued subsidized early retirement payments for a return to active employment.

menting procedural safeguards was not unusual terminology. It was consistent with the common description of the operation of other "suspension" provisions that were in effect when ERISA was enacted. For example, at that time Social Security retirement benefits, Social Security disability benefits, welfare benefits, state unemployment benefits and state workers compensation benefits, among others, could only be stopped due to reemployment or other loss of entitlement after procedural safeguards were followed.[33] The closest contemporary analogy to the ERISA suspension approach may have been the treatment of reemployed workers under the Old Age portion of Social Security.

Throughout the history of the Social Security program a return to employment could adversely impact the receipt of otherwise available benefits. Originally, return to any gainful occupation resulted in complete forfeiture of available payments. This feature of Social Security has been changed many times by Congress, including a significant change just two years before ERISA was enacted that parallels the ERISA suspension of benefits methodology. The 1972 Social Security amendments[34] introduced the Delayed Retirement Credit. With this change, the treatment of reemployed persons under Social Security closely mirrored the ERISA approach.

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[33] *See, e.g.*, Social Security Act, §§ 202(w), 203 & 205; 42 U.S.C. §§ 402(w), 403 & 405 (Social Security reemployment/self employment excess earnings); Social Security Act, § 225; 42 U.S.C. § 425 (Social Security disability benefits); *Dillard v. Industrial Comm of Virginia*, 416 U.S. 783 (1974) (state workers compensation); *Indiana Employment Security Division v. Burney*, 409 U.S. 540 (1973)(state unemployment benefits); *Richardson v. Wright*, 405 U.S. 208 (1972) (Social Security disability benefits); *Calif. Dept. Human Resources Development v. Java*, 402 U.S. 121 (state unemployment benefits); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Wheeler v. Montgomery*, 397 U.S. 280 (1970) (welfare benefits). *See also*, notes 34-35 *infra*.

[34] Social Security Act Amendments of 1972, §§103, 105 & 106, Pub. L. No. 92-603, 86 Stat. 1329 (1972)

When ERISA was enacted, a recipient of Social Security Old Age benefits who elected early retirement would forfeit the entire early retirement payment if he or she earned more than a threshold amount. A reemployed retiree with earnings below that threshold would forfeit a portion of his or her benefits for earnings unless his or her earnings fell below a *de minimis* level. Further, under the Delayed Retirement Credit feature, persons who were reemployed after 65 or whose earlier reemployment continued beyond 65 were still subject to forfeiture of otherwise available current benefits, but their eventual benefits were increased by the credit amount applicable to them to reflect payments otherwise available after age 65. Moreover, reemployed recipients over age 72 were exempted from the suspension of benefits feature of Social Security entirely.[35]

In sum, there is a significant distinction between "reduction" of a benefit formula amount and the "suspension" of a specific early retirement benefit payment which is fully available under a plan's early retirement subsidy formula based upon the plan's accrued benefit formula. Despite the Seventh Circuit's attempt to blur or ignore that distinction, it is a distinction reflected in established plan administration practices that are well grounded in a common sense understanding of the relationship between related statutory provisions and is consistent with the text of those provisions,

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[35] For a detailed description of the evolution of the Social Security retirement earnings test, including the rules in effect when ERISA was enacted, *see generally*, COMM WAYS & MEANS, 101ST CONG., 1ST SESS., BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS, at 16-18 (Comm. Print 1989) (WMCP: 101-41); Office of the Historian of Social Security, RESEARCH NOTE #7: BRIEF HISTORY OF THE RETIREMENT EARNINGS TEST, *available at, http://www.ssa.gov/history/ret.html*; Social Security, HISTORY OF THE PROVISIONS OF OLD-AGE, SURVIVORS, DISABILITY, AND HEALTH INSURANCE, part I(H) (1999), *available at, http://www.ssa.gov/OACT/HOP*.

the relevant legislative history of those provisions and the common understanding of suspension procedures followed under other statutory schemes at the time ERISA was enacted.

C. The Court Below Expanded the Anti-Cutback Rule Beyond its Intended Scope in a Manner that is not Textually Compelled, Interferes with the Intended Operation of the Suspension Rules and Calcifies Both Rules by Preventing Plan Amendments that Keep Pace with Industry and Employment Changes.

The principles of voluntary plan sponsorship and settlor discretion regarding plan design decisions leave plan sponsors free to exercise reserved plan amendment authority to alter a plan, except to the extent such modifications are specifically prohibited by law.[36] As noted above, Respondent's challenge to the amendment of Petitioner Plan is not based upon any alleged failure of the amendment (or the Plan's prospective implementation of the amendment) to satisfy the requirements of ERISA Section 203(a)(3)(B) or Code Section 411(a)(3)(B).[37] Rather, Respondent's position is based solely upon the ERISA Section 204(g) description of early retirement benefits as a part of the participant's accrued benefit that cannot be eliminated or reduced.[38]

The anti-cutback rule on its face merely protects the formula used to measure a participant's "potential" or "available" benefit. By extending the reach of ERISA Section 204(g) to prohibit benefit payment forfeitures expressly authorized by ERISA Section 203(a)(3)(B) and Code Section

[36] *Cf.*, *Lockheed Corp. v. Spink*, 517 U.S. 882, 889-91 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

[37] *Heinz*, 303 F.3d at 804 ("plaintiffs do not contend that the restrictions on post-retirement employment contained in the plan, either before or after the 1998 amendment, violate these restrictions.")

[38] Respondents Brief Opposing Certiorari, at 15-17.

411(a)(3)(B), not just to prevent accrued benefit formula or early retirement subsidy formula reductions or eliminations, the Seventh Circuit majority opinion expanded the reach of the anti-cutback rule. In doing so the Seventh Circuit has infringed upon the proper application of the suspension of benefits rule in a manner that would compromise the rule's capacity to protect plan assets against undue depletion to provide windfall double-dipping payments to participants whose reemployment is inconsistent with the plan's objectives to provide retirement income replacing the income a retiree would otherwise earn from employment.

The Seventh Circuit majority's expansion of the scope of ERISA Section 204(g) is not compelled by the text of that provision and is contrary to the principle that distinct provisions of a statute should be read whenever possible in a manner that harmonizes them and gives meaning to both provisions.[39] Thus, the Seventh Circuit adopted a view of ERISA Section 204(g) that directly clashes with ERISA Section 203(a)(3)(B) and Code Section 411(a)(3)(B). This interpretation treats the ERISA anti-cutback rule amendments as though they were at least a partial implied repeal of the ERISA suspension of benefits rules. Such implied repeals are clearly disfavored.[40]

The Seventh Circuit's view has no support in the legislative history. On the contrary, the view below is even more dubious because it conflicts with contemporaneous evidence

[39] *** [I]t is presumed that Congress uses terms consistently, intends that each provision add something to the statutory scheme, and does not want one provision to be applied in ways that undercut other provisions.

STATUTORY INTERPRETATION, *supra* note 24 at 263. *See, e.g.*, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1985).

[40] STATUTORY INTERPRETATION, *supra* note 24 at 273-74. *See, e.g.*, *Morton v. Macari*, 417 U.S. 535 (1974).

of the intent of the early retirement provision of ERISA Section 204(g) contained in the legislative history of the enactment of that provision. When ERISA Section 204(g) was amended in 1984, the author of the early retirement provision upon which the Court below rests its expansive interpretation of that section expressly disclaimed any intent to curtail the proper operation of the suspension of benefits rule as described above:

> I wish to further clarify the anti cutback provisions of Section 301 of the bill. Those provisions are not intended to apply to benefit changes authorized by existing law*** Nor do those provisions in any way apply to or affect the provisions of ERISA section 203(a)(3)(B) and code section 411(a)(3)(B) relating to the suspension of benefits for postretirement employment, including the authorization for multiemployer plans to adopt stricter rules for the suspension of subsidized early retirement benefits.[41]

Thus, the author of the very language upon which the Seventh Circuit majority relies offered a contemporaneous interpretation of that provision that is inconsistent with the decision below. He made it clear that provision was not intended to interfere with the operation of the suspension of benefit rules. In expressing this view of the legislative intent, Congressman Clay was offering a view that was completely consistent with the principle that specific provisions (the suspension provisions) trump more general provisions,[42] and the preexisting interpretation of the Department of Labor that the suspension rule was a specific rule that trumped another ERISA provision that could have afforded Mr. Heinz the relief he seeks, but for the suspension rules.[43]

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[41] 130 CONG. REC. 23,487 (1984) (statement of Rep.William Clay).

[42] STATUTORY INTERPRETATION, *supra* note 24 at 275.

[43] *See* note 21 *supra* & accompanying text. The Department's view that the suspension provision of ERISA Section 203(a)(3)(B) is sufficiently specific to overcome the more general rules spelled out in ERISA Section 206(a) and Tax Code Section 401(a)(14) lends even more support to Congressman Clay's view. SHRM suggests that in light of Congressman Clay's remarks it should be presumed that in enacting a provision addressing early retirements Congress was aware of the consistent earlier interpretation of the Department of Labor giving primacy to the suspension rules in circumstances where the suspension procedures were followed.

As the *Spacek* court correctly noted, the new provision added to ERISA Section 204(g) was intended to offer subsidized early retirement benefits the same protections afforded other accrued benefits (which are also fully suspendible), not more protection, as is compelled by the logic of the Seventh Circuit majority's holding.[44] Moreover, the differential treatment afforded ERISA compliant pre-65 suspensions, on the one hand, and post-65 suspensions and ERISA non compliant pre-65 suspensions, on the other hand, has been recognized as proper in applicable regulations [45] and, as discussed above, is supported by the express language of ERISA.

ERISA Section 203(a)(3)(B) by referring to industry employment instead of a more precise and limited category of reemployment, left room for changes that would result from ordinary changes in the scope and composition of industries, including plan scope changes that could occur due to mergers, acquisitions, product line expansions, job growth and job and industry contraction. Plainly ERISA Section 203(a)(3)(B) was intended to offer some measure of flexibility. In adopting

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[44] 134 F.3d at 291.

[45] *Compare*, Treas. Reg § 1.411(c)-1(f), *with*, ERISA § 204(b)(1)(H)(iii)(II); 29 U.S.C. § 1054(b)(1)(H)(iii)(II). *See also* notes 21-23 *supra* & accompanying text. Although the authority to issue regulations under ERISA Section 203(a)(3)(B) and I.R.C. § 411(a)(3)(B) was granted to the Department of Labor, the Treasury Department was granted authority to interpret the ant-cutback rules that were enacted in parallel form in ERISA Section 204(g) and Tax Code Section 411(d)(6).

amendments conforming Petitioner Plan's benefit suspension rules to the regulations interpreting that Section, the Plan was merely taking full advantage of the permissive provisions of ERISA Section 203(a)(3)(B) and Tax Code Section 411(a)(3)(B). Because of the prospective impact of any benefit suspension that is required by the prior personal notification requirements of the regulations, Petitioner Plan did nothing more than afford Respondent a choice to remain in employment and forfeit some months of the plan's subsidized early retirement benefit or resume retirement status, reduce his hours or work in another industry or area, and receive the available payments. Respondent's decision to remain in industry employment cost him some early retirement payments, but his accrued benefit, the measure of his available potential benefit, was neither diminished nor eliminated; it was simply not actuarially increased due to the fact he had not yet reached normal retirement age.

These conclusions are consistent with a reading of the statute that gives full reasonable effect to both the anti-cutback and the suspension of benefits provisions. This reading of the two provisions is consistent with the applicable regulations, with the legislative history and with the correctly decided opinion of the Fifth Circuit in *Spacek*.

D. Respondent Misstated the ERISA Suspension Rules and Would Have this Court Create a New Right to Double-Dip in Contravention of those Rules.

Two assertions in Respondents Brief in Opposition to Certiorari merit comment.

First, Respondent offered an *in terrorum* argument that reversal of the Seventh Circuit's decision would permit arbitrary suspensions of the early retirement benefits of all participants for a period of time, presumably without regard to the presence or absence of proof of suspendible reem-

ployment.[46] SHRM contends this assertion vastly overstates the impact of reversal since the suspension forfeitures that would be permitted if the decision below is reversed are only those permitted under the ERISA suspension rules. Under those rules, a reemployment triggering a forfeiture must be suspendible reemployment (i.e., full-time employment in the industry) and such "unretirement" must persist after personal notice.[47] Thus, Respondent's assertion that reversal permits a blanket suspension of all early retirement subsidy payments to all participants is plainly erroneous.

Second, Respondent asserts he has a justifiable expectation and entitlement to have his early retirement subsidy payments continue despite his suspendible reemployment.[48] This assertion is based in part upon: (i) Respondent's assertion there is nothing "magical" about the term suspension; (ii) his free association substitution of the anti-cutback terms "reduction" and "elimination" for the term "suspension;" and (iii) his shift of the object of the anti-cutback protection from the early retirement formula amount (which is its proper object) to the actual payments of early retirement benefits (which are the proper object of the suspension rules and under those rules may be forfeited).[49] This "sleight of hand" is entirely premised upon Respondent's assertion that there is nothing special about the term "suspension." On the contrary, as discussed above, that term is special. It is a term with an established meaning that Congress selected and infused with even more meaning. In doing so Congress took an approach inconsistent with the decision below. Congress infused the term "suspension" with the power to override vesting if a participant who has been reemployed in the industry does not

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[46] Respondents Brief Opposing Certiorari, at 15.

[47] 29 C.F.R. §2530.203-3.

[48] Respondents Brief Opposing Certiorari, at 16.

[49] *Id.*

abandon that suspendible employment by returning to retirement, reducing his or her hours or seeking employment outside the industry or the area. If this is "magic," it is the magic of the legislative authority vested in Congress by our Constitution and may not be so easily overcome by "sleight of hand" or "word games."

CONCLUSION

For the reasons described above, the decision of the Seventh Circuit below should be vacated and this case should be remanded with instructions to apply the anti-cutback provisions of ERISA Section 204(g) and Tax Code Section 411(d)(6) in a manner consistent with the Fifth Circuit's decision in *Spacek*.

Respectfully submitted,

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